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AZ CORP COMMISSION
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1 WILLIAM MUNDELL
2 Chairman
3 JIM IRVIN
4 Commissioner
5 MARC SPITZER
6 Commissioner

7 IN THE MATTER OF THE APPLICATION OF
8 CITIZENS COMMUNICATIONS COMPANY,
9 ARIZONA GAS DIVISION, FOR A HEARING
10 TO DETERMINE THE FAIR VALUE OF ITS
11 PROPERTIES FOR RATEMAKING PURPOSES,
12 TO FIX A JUST AND REASONABLE RATE OF
13 RETURN THEREON, AND TO APPROVE RATE
14 SCHEDULES DESIGNED TO PROVIDE SUCH
15 RATE OF RETURN)

Docket No. G-01032A-02-0598

**CITIZENS' REPLY TO RUCO'S
RESPONSE TO MOTION FOR
FOR PROTECTIVE ORDER**

16 In its Response, RUCO insists that it be allowed to publicly disclose information
17 provided by Citizens to the Commission in this matter without first obtaining an order from
18 the Commission authorizing such disclosure. RUCO's proposal directly violates Arizona
19 law, which provides that "[n]o information furnished to the commission by a public service
20 corporation, except matters specifically required to be open to public inspection, **shall be**
21 **open to public inspection or made public except on order of the commission entered**
22 **after notice to the affected public service corporation**, or by the commission or a
23 commissioner in the course of a hearing or proceeding." A.R.S. § 40-204.C (emphasis
24 added). Citizens' Motion for Protective Order expressly relies upon this statute, but
25 RUCO's Response does not even mention it, must less attempt to reconcile the statutory
26 mandate with RUCO's wholly inconsistent form of protective order. RUCO's demand for
27 indemnification is also contrary to Arizona law, and must be rejected.

28 This Reply shows that RUCO's proposed form of Protective Order should not be
approved, and that RUCO's various objections to Citizens' proposed form of Protective
Order are meritless.

Arizona Corporation Commission
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1 **I. RUCO'S Proposed Form Of Protective Order Must Be Rejected Because It**
2 **Would Allow RUCO To Disclose Citizens' Confidential Information In Violation**
3 **Of Arizona Law.**

4 RUCO's proposed form of Protective Order cannot be reconciled with the
5 requirements of A.R.S. § 40-204.C., and RUCO does not even bother to try. That statute
6 squarely prohibits RUCO from disclosing to the public any information provided by Citizens
7 in this matter, except for "matters required to be open to public inspection," or "on order of
8 the Commission entered after notice to the affected public service corporation." RUCO
9 does not contend that any of the subject information is "required to be open for public
10 inspection." And its proposed form of Protective Order would allow RUCO to bypass the
11 Commission altogether, and to unilaterally decide whether and when to publish Citizens'
12 Confidential Information unless "Citizens initiates a protective proceeding." See RUCO
13 Proposed Protective Order at Section 7. Because RUCO's proposed form of protective
order contravenes Arizona law, it must be rejected.

14 **II. RUCO'S Proposed Form Of Protective Order Must Be Rejected Because It's**
15 **Demand For Indemnification Is Improper.**

16 RUCO's proposed form of Protective Order also would require Citizens "to indemnify
17 and hold RUCO harmless from any assessment of expenses, attorneys fees or damages
18 under A.R.S. § 39-121.02 or any other law, resulting from the denial of access by RUCO to
19 the information, data, records or study subsequently found to be non-confidential." See
20 RUCO Proposed Protective Order at Section 9. This proposal should be rejected for each
21 of the following reasons:

22 First, RUCO's asserted need for indemnification is groundless because where, as
23 here, a statute expressly provides that a public agency shall not be disclose certain
24 information, that statute trumps Arizona's Public Records Law. *Berry v. State of Arizona*
25 *Dept. of Corrections*, 145 Ariz. 2, 699 P.2d 387, 388 (Ct. App. 1985) (Public Records Law
26 does not apply to inmate master record files because the specific provisions of A.R.S. §
27 31-221 make these records confidential).¹ Thus, RUCO cannot be ordered to disclose
28

1 Courtesy copies of cited cases have been provided to the Administrative Law Judge.

1 Citizens' Confidential Information in a subsequent public records civil lawsuit, much less be
2 required to pay damages or attorneys' fees, because a specific Arizona statute – Section
3 40-204.C – exempts such records from the Public Records Law. Because RUCO has not
4 and cannot demonstrate any need for indemnification, its demand for an indemnity
5 provision in the Protective Order should be summarily rejected.

6 Second, RUCO's request for an indemnification order is not ripe for adjudication.
7 No public records request has been made, or denied, and no public records litigation has
8 been commenced or threatened. RUCO's request presents no case or controversy to be
9 adjudicated.

10 Third, even if RUCO's request for indemnification were ripe, it could not be
11 adjudicated by the Commission because subject matter jurisdiction over civil litigation
12 under Arizona's Public Records Law is conferred by law upon the Arizona Superior Court,
13 not the Commission. A.R.S. (S) 39-121.02.A ("Any person . . . who has been denied
14 access to or the right to copy [public] records, may appeal the denial through a special
15 action in the superior court" See also A.R.S. § 39-121.02 B ("If the **court** determines
16 that a person was wrongfully denied access to or the right to copy a public record and if the
17 **court** finds that the custodian of such public record acted in bad faith, or in an arbitrary or
18 capricious manner, the **superior court** may award to the petitioner legal costs, including
19 reasonable attorney fees, as determined by the **court**.")(emphasis added). Citizens is
20 unaware of any jurisdictional basis under which the Commission could lawfully determine
21 whether RUCO should be indemnified against costs assessed by the Court under these
22 statutes.

23 Fourth, there is at least a serious public policy question as to whether RUCO or any
24 other public agency should be entitled to indemnity from fees assessed by a court for
25 "act[ing] in bad faith or in an arbitrary or capricious manner," yet that it precisely what
26 RUCO's proposed form of Protective Order would provide in this case. Citizens questions
27 whether a public agency can be indemnified for its own intentional misconduct in
28 connection with a public records request.

1 Finally, Citizens questions whether it or any other public service corporation could ever be
2 required to indemnify RUCO for any costs RUCO incurs as a result of its compliance with
3 Arizona law. The Legislature has provided that public agencies shall comply with A.R.S. §
4 40-204.C, and that public agencies shall comply with the Public Records Law. Nothing in
5 either statute suggests that the Commission can transfer a public agency's costs of
6 complying with those statutes to a private party.

7 In short, RUCO's demand for indemnification should be rejected because it is
8 contrary to law, premature, asserted in the wrong forum, and inconsistent with sound public
9 policy.

10 **III. RUCO'S Objections To Citizens' Proposed Protective Order Are Meritless.**

11 RUCO does not dispute that the form of Protective Order proffered by Citizens is
12 substantially similar to Protective Agreements executed and implemented by RUCO in
13 previously filed cases involving Citizens' Confidential Information. Nor does RUCO dispute
14 that the form of Protective Order proposed by Citizens is fully consistent with the statutory
15 mandate of A.R.S. Section 40-204.C. RUCO nevertheless objects to Citizens' proposed
16 form of Protective Order because: (i) it would impose on RUCO the "burden" to file a
17 motion with the Commission before publicly disclosing Citizens' Confidential Information;
18 and (ii) it differs from the form of Protective Agreement between Citizens and Staff. Both
19 arguments are addressed below.

20 **IV. Arizona Law Requires Ruco To Secure An Order From The Commission**
21 **Before It May Disclose Information Provided By Citizens In This Matter.**

22 RUCO urges that "the party from whom discovery is sought has the burden to
23 establish the validity of the objection to that discovery based on a claim of trade secret."
24 [Resp. at 3] RUCO's reliance on this general discovery principle is misplaced. First, RUCO
25 has confused the concepts of a party's providing Confidential Information in response to a
26 discovery request and of the receiving party's ability to make such Confidential Information
27 public. Second, RUCO's assertion ignores the fact that Citizens is not required to show
28 that its information is a trade secret to secure the protection of the applicable statute To

1 the contrary, A.R.S. § 40-204.C. prohibits RUCO from disclosing Citizens' information
2 without an express order of the Commission whether the information is a trade secret or
3 not. Given this clear statutory mandate, it is difficult to see why the rules of civil procedure
4 are even relevant to this issue.

5 A more analogous body of law has been developed under the Freedom of
6 Information Act ("FOIA"), which prohibits public agencies from disclosing information under
7 their control where the information is "specifically exempted from disclosure by statute."
8 See 5 U. S. C. Section 552 (b). Cases construing that statutory exemption recognize that
9 the issue of whether disclosure is permitted is one of statutory construction, not application
10 of a rule of procedure, and hold that agencies may not disclose information that falls within
11 the purview of a nondisclosure statute. *Baldrige v. Shapiro*, 455 U.S. 345, 359 (1981) (raw
12 census data protected from disclosure by statute); *Landmark Legal Foundation, v. Internal*
13 *Revenue Service*, 267 F. 3d 1132, 1138 (D.C. Cir. 2001) (taxpayer data protected from
14 disclosure by statute).

15 Arizona generally follows federal FOIA law in evaluating requests for disclosure from
16 a public agency. *Salt River Pima-Maricopa Indian Community v. Rogers*, 168 Ariz. 531,
17 ___, 815 P.2d 900, 909-11 (1991) (granting special action relief to prevent disclosure of
18 personal information about Community's members). Arizona has adopted numerous
19 statutes and rules that prohibit disclosure of specified information by a public agency.²
20 Arizona recognizes that public agencies cannot disclose information where a statute

21
22 ² A partial list of such statutes and rules includes the following:

23 Certain records of professional groups including: (1) accountants (A.R.S. § 32-749(A)); (2) attorneys
(Ariz. R. Crim. Proc. 15.4(b)); (3) dentists (A.R.S. § 32-1209); and (4) psychologists (A.R.S. § 32-32-2085).

24 Records compiled in the course of: (1) adoption proceedings (A.R.S. §§ 8-120(A)); (2) attorneys'
disciplinary proceedings (Sup. Ct. R. 61(a) and (c)); (3) grand jury proceedings (A.R.S. § 13-2812); and (4)
25 minutes from executive sessions of public bodies (A.R.S. § 38-431.03(B)).

26 Certain law enforcement records including: (1) wrongful arrest (A.R.S. § 13-4051(B)); (2) consumer
fraud (A.R.S. § 44-1525); (3) corrections department (A.R.S. § 31-221(c)); (4) criminal indictments (A.R.S. §
13-2813); (5) private investigator case files (A.R.S. § 32-2455); (6) racketeering investigations (A.R.S. § 13-
27 2315); and (7) criminal intelligence information (A.R.S. § 41-2204(4)).

28 And certain health care records including: (1) A.R.S. § 36-340(C) (illegitimate births); (2) A.R.S. § 36-
509 (mental patients); (3) A.R.S. § 36-340(A) (vital statistics); (4) A.R.S. § 36-445.01(A) (hospital panels); and
(5) A.R.S. § 32-1451.01 (Board of Medical Examiners).

1 prohibits such disclosure. *Berry, supra*, 699 P.2d at 388. RUCO concedes it is a public
2 agency. [Response at 4] The information at issue is expressly covered by A.R.S. § 40-
3 204.C and is protected from disclosure without regard to whether it is a trade secret. For
4 all these reasons, RUCO's reliance on Ariz. R. Civ. P. 26(c)(7) is unavailing.

5
6 **V. RUCO'S Reliance On The Terms Of The Protective Agreement Between
Citizens And Staff Is Also Misplaced.**

7 RUCO protests that the form of protective order it seeks is no different from the
8 protective agreement between Citizens and Staff, but it overlooks a critical distinction
9 between RUCO and the Commission's Staff. A.R.S. § 40-204.D provides that "[a]ny officer
10 or employee **of the commission** who knowingly divulges such information [covered by
11 section 204.C] is guilty of a class 2 misdemeanor." (emphasis added) By its terms, Section
12 204.D applies only to the Commission and its Staff—not to RUCO. Thus, regardless of
13 what the Protective Agreement between Staff and Citizens provides, the commission staff
14 cannot publicly disclose information provided by Citizens without first complying with A.R.S.
15 § 40-204.C, or risking criminal sanctions.

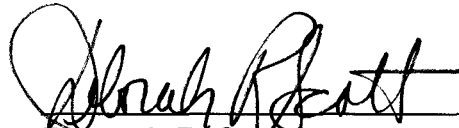
16 By contrast, RUCO officers and employees are not subject to the same criminal
17 penalties for disclosing Citizens' information without a proper order. This may be a
18 legislative oversight, as Section 204 was adopted long before the Legislature created
19 RUCO, but the clear language of Section 204. D. makes the criminal penalties applicable
20 only to commission employees. Because of this distinction that subjects Staff (but not
21 RUCO) to criminal penalties for disclosure of Citizens' Confidential Information, RUCO
22 cannot complain that it has been treated differently from the Commission Staff with respect
23 to the disclosure of such Information.

24
25 **VI. Conclusion**

26 For the foregoing reasons, Citizens respectfully requests that the Administrative Law
27 Judge approve the form of Protective Order attached to Citizens' Motion as Exhibit 1.

28 ...

1 RESPECTFULLY SUBMITTED this 11 th day of December, 2002.

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